National Environmental Conflict Resolution Advisory Committee
Affected Communities Subcommittee

DRAFT FINDINGS AND RECOMMENDATIONS

May 13, 2004

AFFECTED COMMUNITIES SUBCOMMITTEE MEMBERS
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INTRODUCTION
Section 101 of the National Environmental Policy Act (NEPA) is great poetry and eloquently describes
the goal of the American people and their government to find the perfect balance between our use of
natural resources and the responsibility we have to protect those resources. It establishes a minimum
baseline that must be maintained in a way that responsibly reflects good stewardship securing precious
environmental resources for future generations. Seeking "Productive Harmony, Protection of Health and
Environmental Quality, Integration, Sustainability, Equity [and] Balance" are the stated principles of
NEPA.

This draft presents the key findings and recommendations of the Affected Communities (AC)
Subcommittee that are being presented for consideration by the Environmental Conflict Resolution
Advisory Committee (NECRAC). The intent is to link the work of the AC Subcommittee to the work of
the NEPA 101 and Best Practices Subcommittees, based on the assumption that the applicability and
effectiveness of NEPA 101 and Environmental Conflict Resolution (ECR) should truly be measured and
assessed at the community level.

It is the goal of the Affected Communities Subcommittee to document key principles and strategies in
assisting local stakeholders in effectively participating in environmental conflict resolution processes.
Understanding barriers and obstacles that hinder effective dialogue and negotiation among involved
parties is key. The definition of the "affected community" will vary from environmental problem to
problem due to variances in geographic scope as well as the cultural and civil attributes of people and
communities affected by the problem.

We encourage stakeholders to internalize the thoughts listed here. We speak conceptually and do not
propose to outline the specific formula for success in resolving conflicts. Common sense and a good
sense of fairness should guide the practitioner to a good end.

PREAMBLE

Freedom, liberty and self-preservation are inherent to the human personality regardless of geography, economic, education, and cultural or ethnic position. These principles sustain the hope of achieving balance among us all as separate peoples with diverse interests.

There are, however, other natural traits among us and within affected communities that work to divide us; we must commit ourselves to be honest in acknowledging our differences and earnest in our attempts to accommodate them. These differences may be driven by our lack of knowledge of each other's culture, customs, traditions and values. In the end, we must find a way to inculcate the idea that we are all affected by our individual contributions to the degradation of "OUR" environment and we must all work to change behaviors across a large number of communities and countries to have a measurable and needed improvement to our environment.

What we say here is derived from honest dialogue among representatives of community, private sector, government, tribal and mediator/facilitator perspectives. We utilized the principles described here to resolve hard conflicts in views and ideas that developed among us from time to time and believe this document represents our best thoughts. We offer our thoughts as guidance so other stakeholders can avoid the high costs in time, money, emotional energy and lost opportunity that we have suffered in our own experiences with environmental conflicts.

Learning must occur among all stakeholders to increase our appreciation for our separate interests and sovereign rights. We must see the humanity in each of us and bring a commitment to build the level of trust required to solve complex conflicts.

IMPORTANCE OF AFFECTED COMMUNITIES

Threats to environment, the economy, culture and social values affect both urban and rural communities throughout the country; the rise of these conflicts will impact all communities. Communities and government agencies lack sufficient capacity to solve these challenges using traditional approaches, such as legal confrontation and technical challenges. Therefore, many communities resort to the methods they know best - political confrontation and conflict and managing these conflicts has been an enormous and costly challenge to federal, tribal, state and local regulators.

The fundamental message of this document is that conflict resolution can no longer be considered an "alternative" – its principles, conditions and actions must be standard practice while staying within the statutory confines of the law and respecting legal rights of advocates. The early and effective involvement of affected communities is an essential, not optional, element in the implementation of the National Environmental Policy Act (NEPA).

The Subcommittee pursued its discussions without assuming that NEPA itself will need to be amended to achieve the goals that are articulated. However, the Subcommittee does not rule out the possibility that such changes might be necessary in the future should sufficient progress not be made within a reasonable period of time.

The work of the NEPA 101 Subcommittee substantiates the fact that NEPA 101 and ECR are mutually reinforcing and entirely compatible. The Subcommittee believes that it is particularly important that Federal actors, other levels of government and stakeholders recognize the mutually reinforcing objectives of Section 101 and ECR.

The NEPA statute supports basic principles and values with regard to "incorporation of environmental values along with economic, community, tribal, cultural and other social considerations….." The Subcommittee believes, however, that the current application of NEPA is falling far short of fulfilling this objective. For example, with regard to Tribal concerns there are three important aspects that need to be addressed: the role of Tribes as cooperating agencies, the consideration of off reservation impacts related to trust resources, and the need for consistent application of early engagement of Tribes at time of determining plan, purpose, and need.

KEY PRINCIPLES, NECESSARY CONDITIONS AND ACTIONS

During the course of its deliberations, the Subcommittee discussed and defined a set of principles, necessary conditions, actions and barriers that must be overcome (See Attachment 1). It is important to note that their deliberations were informed and enriched through interaction with members of the public during their Subcommittee meeting in Hartford, Connecticut.

Principles that must be understood and adhered to to create workable, fair and just solutions to problems affecting communities.

- **Respect** - Mutual respect among all parties before, during and after a problem is identified is essential to success. Without mutual respect there is no foundation upon which to build constructive solutions.

- **Trust** - Building and maintaining trust is essential to successfully resolving problems. Trust should not be assumed; it must be earned.

- **Accountability/Responsibility** - All parties to a dispute must honestly communicate and define their interests and concerns. Parties need to accountable for living up to the commitments they make through evaluation based on measurable objectives.

- **Courage** - All parties must have the courage to be committed to achieve fair and just decisions and the courage to take risks in order to reach and hold final solutions.

- **Moral obligation** - Public officials must be committed to public service in a manner that honors the social, cultural and economic values of affected communities as well as the public at large. Community members must be committed to spend the time necessary to accurately and ethically reflect the concerns and interests of their community.

- **Shared responsibility** – In addition to representing their own interests, rights and obligations, all parties share the responsibility of defining common goals and striving to attain them for the betterment of the affected community and society as a whole.

Conditions that are critical to achieving workable solutions.

- **Reciprocity** – All parties must share their respective interests, needs and goals in order to lay the foundation for development of mutually acceptable outcomes.

- **Transparency and openness** - All parties must accept responsibility to inform each other in a thorough and timely manner regarding matters that may either limit or enable an agreement.

- **Strong relationships among parties** - In order to solve long-term, complex problems, parties must understand each other's interests and limits working toward solutions in creative ways.

- **Commitment** – Parties must be willing and able to stay to the end of the process and implement outcomes or agreements.

- **Sovereignty** - All parties in a dispute must understand and respect the sovereignty, authority and interests of the other participants.

- **Problem Solving Approach** - A mindset that addresses the issue and solving the problem, not on imposing the power/authority of one entity to the exclusion of others. Regulators need to be willing to transfer ownership of the issue to a collaborative process that involves all concerned parties.

- **Availability of Credible Information** - Need for shared understanding of best available science and traditional and local knowledge from credible and trusted sources.

Actions that help solve problems or prevent disputes.

- **Implementation** – Parties must meet obligations including honoring the principles and conditions that led to the agreement. They should use tools (i.e., decision registers) that track the elements of the agreement, tasks, responsibilities and completion timelines.

- **Monitor and evaluate** – Parties must collaboratively design and manage the process to ensure conformity with agreements, continuous improvement of conditions and re-validate original principles.

- **Open and timely communication** - All parties must be honest and forthright in their actions and communications including creation of a public record. No party may withhold information that is critical to addressing the issues at hand.

- **Be timely and take time** - Early community involvement is essential including identifying and getting the stakeholders to the table and responding to urgent community needs, while taking the time to build relationships that will last through the process and implementation of the solution. As an initial step, parties should agree upon a process timeline that establishing key milestones and actions.

- **Be flexible** - All parties, especially agencies, should encourage innovation and flexibility. Parties must be willing to listen to other ideas and think beyond their institutional position or prior experiences.

- **Build capacity and encourage leadership** – The process should be designed to build a sustainable capacity within the affected community to address future issues.

- **Training** - Sensitivity to cultural social and economic values of the affected community is essential to successful engagement. Training must be provided on both people skills and understanding of the affected community.

- **Demonstrate respect** - In order to obtain active and committed participation from the affected community, respect and trust must be established. For example, acknowledge the role of the community as "teacher"; ask questions rather than presenting the "answer", and do not be misled by images and stereotypes.

- **Fund participation and technical assistance** - Agencies and stakeholders should set aside resources and funds to ensure affected communities can participate fully and are fairly represented in the process.

RECOMMENDED PROCESS

There is a need for government decision makers to understand and support the movement of the issue/conflict to a process in which the stakeholders are full participants and the government role becomes more of facilitator and enabler than unilateral decision maker. It is very important to note that this alteration in role does not undermine the authority and responsibility of government to ensure compliance with the law. The responsible governmental entity always retains that authority, but what needs to change is the willingness of agencies to consider stakeholder-based approaches to formulating decisions.

The suggested approach is illustrated by Figure 1 below. The fundamental difference between the traditional approach and the recommended approach is the sense of ownership of the issues and process by the stakeholders, in collaboration with the relevant agencies.

Figure 1

Traditional   Recommended
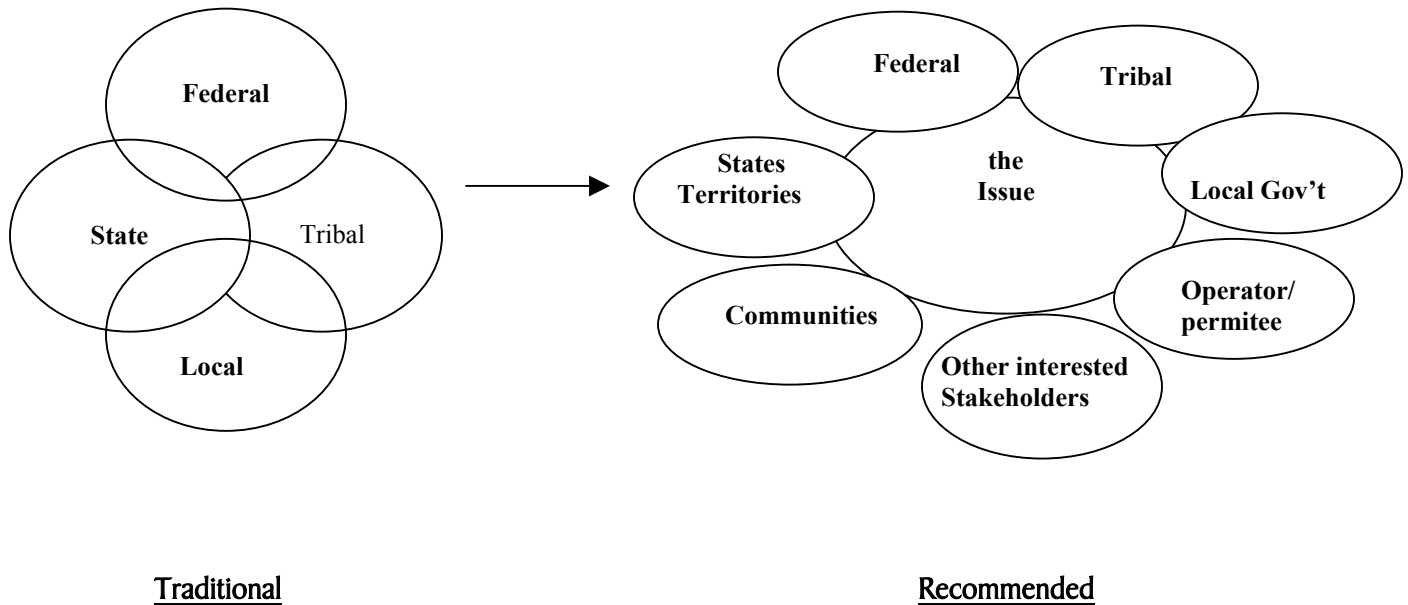
To make the process work effectively, community members have to embrace ECR as a viable and effective way to resolve conflicts they are concerned about. Steps to be followed would include:

1. Creation of a "stakeholder table" where all stakeholders share in the design and implementation of problem solving process in accordance with the guiding principles articulated above. All interests would come to bear on the decision making process sooner or later because these processes would be "front-loaded" in the effort to create a coherent forum/process within which to express those interests.

2. It would be very important to determine who the appropriate parties to be involved are. There is a need to be sure that authentic community interests are well and accurately represented. Often there will be multiple communities with an interest in the issue being addressed.   It is better to be more inclusive than limiting at the outset and to create an open process. The group needs to be directly involved in decisions about adding new participants to the group. It would be important that all parties stay at the table long enough to gain an honest understanding of respective interests. Mutually determining the goal and objectives of the process should be one of the first items stakeholders might address. The fact that all of stakeholders are at the table as equal stakeholders creates a more "level playing field" on which to try and address the issues of concern.

3. It should be a priority to keep the focus on the "issue" rather than the regulations and use the legal/regulatory framework to help solve the problem, not the other way around, as too often is the case.

4. This approach calls for a different role for the federal representatives – they need to empower the process and the parties through creation of incentives available from all federal resources, provide information and take on a problem solving, rather than simply delegate to themselves the final decision maker role. Federal, as well as other stakeholder interests needs to be transparent. Additionally, federal actors should be as flexible as possible as to how their regulatory responsibilities are carried out. Further, federal participation does not mean that the federal trust responsibility to tribes gets abrogated. Also, if the Federal Advisory Committee Act (FACA) is triggered, the conveners should not be afraid to follow that process.

5. It would be very important that there be agreement regarding ground rules to guide the process and protect the participants.

Attachment 2 contains a description of how this approach has been applied in the context of environmental justice concerns.

Recommendations for Action by the
U.S. Institute for Environmental Conflict Resolution

1. The U.S. Institute in collaboration with CEQ should guide federal agencies and stakeholders in the application of NEPA using the Committee's recommended collaborative ECR framework. Specifically, the U.S. Institute should ensure that the framework reflects the concerns of and is accessible to affected communities through the development of agency guidance, training materials and research and evaluation.

2. In implementing the U.S. Institute's authorized ECR participation fund the U.S. Institute should:
   a) use the fund, to the extent possible, to assist effective engagement of affected communities who do not have other means of supporting their participation
   b) develop a long-term strategy to expand and institutionalize the fund in support of community participation.
   c) seek a diverse set of partners (e.g., private sector, foundation, other agencies) in support of the fund
   d) explore whether the fund could be managed as a revolving fund that would be replenished with from other sources.
   e) ensure robust evaluation of projects to share and communicate the added value of effective engagement of communities.
   f) establish a mini-grants program to support the involvement of community groups and organization in ECR processes
   g) explore the use of environmental fines and penalties in support of the fund

3. Steps should be taken to assist Federal actors so they can avoid reinforcing the existing barriers to effective community participation that have been identified. Clear guidelines and training on topics such as the underlying principles of effective community involvement, cultural history and awareness, and communication skills should be developed and made available and delivered to those personnel on the "front lines". The Subcommittee suggests there may be an appropriate role for the U.S. Institute for Environmental Conflict Resolution to assist in the development of these materials. Subcommittee recommends that targeted resources be obtained to further develop these training materials based on the findings in the report. A point person should be designated at the U.S. Institute to coordinate the development of a network to support the development and delivery of training and serve as a resource for agencies.

4. The U.S. Institute should assist in establish coordination and sharing of resources and expertise between agency personnel responsible for public participation, tribal issues, ECR, EJ, and NEPA pieces. The U.S. Institute should develop a strategy to integrate, network, and exchange information across agencies. There should be a focus on implementation and ways to create incentives for the improved use of ECR approaches with affected communities. The U.S. Institute should develop approaches to integrating recognition for the effective use of these approaches by agency personnel. The U.S. Institute should also take the lead in developing

performance outcomes and measures for agencies that can be utilized under the Government Results and Performance Act (GPRA).

5. The U.S. Institute should suggest to the EPA's Office of Environmental Justice that an ECR subcommittee of NEJAC be created.

6. Explore the creation of an exchange programs between NGOs, private sector entities, community organizations and government agencies to facilitate mutual education and shared experiences across interests.

7. Consider how to engage the private sector in support of these approaches. The U.S. Institute could assess effectiveness of past cases. Target specific industry sectors that are interacting with communities on an ongoing basis (e.g., military).

8 Identify several specific issues where significant future impacts on communities are anticipated and therefore can benefit from proactive engagement between project components and communities. Examples include military base closures, energy development, and forestry and fire policy and management.

9 Recharter the National ECR Advisory Committee to assist in implementing these recommendations.

ATTACHMENT 1

BARRIER ANALYSIS

(This is a summary of a more extensive analysis that was conducted by the Subcommittee during its first several meetings – the longer document is available for review)

1. Reviewing opportunities to establish a formal ECR process within NEPA requires identifying issues facing affected communities and their ability to adequately participate. Among the issues raised were inadequate communication, language barriers, and cultural differences, which result in the lack of participation. Examples of issues are:

   a) Inadequate communication due to:
      - Ineffective management, staffing, and process (e.g., inadequate training, turn-over)
      - Laws, interpretations, and regulations
      - Lack of technical assistance and access to information
      - Poor public or late notice and lack of public agencies to facilitate meaningful and systematic participation causes increased conflict for stakeholders.
   b) Language
      - The need for translations that articulate the issues and provide past, present, and future desired conditions for decision-making context.
   c) Cultural
      - The ability to self identify through knowledge-based interest.
      - Empowerment legitimized by cultural ties to the issues.
      - Health based issues based on culture.

2. Empowerment of communities, power balance at the table, and balanced, broad and effective representation
   - Difficulty in defining the "affected community" that represents a community as a whole and maintaining its legitimacy throughout a prolonged process
   - AC representatives are challenged by maintaining a connection to a community with multiple views and interests.
   - AC's lack political and jurisdictional powers of influence, power among community members, and unity within the community itself.
   - AC's multiple perspectives in balancing may affect their ability to develop the range of alternatives available to them, and the ability to determine an equitable settlement.

3. Community sovereignty, self-determination and involvement
   - AC's assume inter-governmental collaboration at all levels. This causes confusion over roles, jurisdiction and rules. Including the lack of understanding of tribal governance, self-determination and self-regulation.

- Stakeholders' (including governments) lack understanding Lack of understanding of the federal government's obligation to tribes to support their self-governance and the continuation of the culture.
- Failure to acknowledge air and water currents along with migratory patterns of creatures of the air, water or land lays a direct global connectedness of all people's responsibility for environmental stewardship.
- Involvement of AC's in decision-making and in ECR processes.
- Involvement and input from local communities for decision making; use of place-based knowledge
- Can communities secure agreements that will be binding in the long-term?

4. **Resources and economics**
   a) Lack of access to resources (i.e. financial and informational) for effective participation:
      - Poor knowledge of and access to information regarding rights, roles, procedures and terminology. And poor access to scientific services, legal services, communications technology,
      - Poor access to decision makers, policy makers and agency personnel, as well as lack of political support
   b) Time requirements for the effective participation in ECR processes (for example, during the workday and across several months or years, during harvest, etc.); other stakeholder representatives are paid to participate.

5. **Governments are not effective enough at engaging affected communities in environmental decision-making processes**
   - Processes are hard, rigid, legally contradictory, conflicting, and the lack of clarity produces barriers for affected communities.
   - Fear and discomfort by government decision makers in engaging community representatives
   - Too often all that is sought from communities is input, not true involvement in decision making
   - Need for increasing diversity in staffing at agencies to assist in developing productive relationships with local communities

6. **Decision processes do not engage affected communities early enough or in ways that lead to effective expression of the affected community's interests – as expressed by the typical agency "decide, announce, defend" syndrome as opposed to "propose, engage/partner, decide".**
   - Agencies tend to develop preferred course of action before consulting affected communities.
   - AC's require up front time and effort to have adequate participation and could be notified at the point of purpose of need.
   - Project proponents demand agencies to make rapid decisions which tends to truncate time for effective community engagement
   - Agency staff and others can be intimidated by affected communities but need to maintain respect for their role in the process; this includes respect for time commitments and resources.
   - Despite budget constraints, public involvement needs champions and committed and trained managers within agencies.

7. **Role of science and technology**
   - Affected communities need access to reliable scientific information and expertise to interpret scientific information.
   - AC's may be skeptical of technological fixes and lack the ability to interpret the fixes for decision-making.
   - Dueling experts/science can cause difficulties
   - Obtaining reliable information and using technology may be cost-prohibitive.
   - Traditional and local (place based) knowledge is not readily accepted as scientific or valid
   - Structuring and translating science for decision makers
   - Need for appropriately designed monitoring

ATTACHMENT 2

ELEMENTS OF A SUCCESSFUL AGREEMENT ADDRESSING ISSUES
OF CONCERN TO AN AFFECTED COMMUNITY

Environmental Justice conflicts are emerging throughout the country as Affected Communities experience "awakenings" as the connections are being made between health affects and the polluting effects of environmentally risky projects disproportionately place in their communities. Generally, these EJ communities lack the legal and scientific capacity to wage battle; therefore, many EJ communities resort to the method they know best—political confrontation and conflict. Managing these conflicts has been an enormous challenge to federal, tribal, state and local regulators. This document was developed as a tool to help disputing parties and the government regulators find a way to resolve EJ disputes through negotiation/mediation while respecting the interests of all parties and staying within the statutory confines of the law.

Many EJ communities have seen legal and political tactics as their only road to justice on the questions in dispute; that thinking is evolving (and must continue to evolve) to accept negotiation/mediation as an effective alternative to political and legal machinations.

After "Setting The Table" right, the next step is to gain agreement from the disputing parties around the "Elements of A Successful Agreement." The first concern of Affected Community members is usually to "stop the polluting affects of the existing facility." Parties must agree that unless the issue of health/environmental impact is addressed, there is no need to negotiate ANYTHING else. Once an agreement addresses this impact, then other options are available for negotiation and the 5 Elements of A Successful EJ Agreement are as follows:

1. Maximum implementation of technology and modern procedures in the operation of the facility to fully address the "incorporation of environmental values along with economic, community, tribal, cultural and other social considerations. (Zero emissions is possible and is the goal)
2. Series of testing completed to prove to the Affected Community's total satisfaction that health/environmental impact issues have been fully addressed.
3. On-going testing and monitoring are in place and controlled by the Affected Community to assure continuous compliance with safe operations standards.
4. The private operator is given a fair opportunity to make the case for capacity increase in light of #1-3.
5. In consideration of possible capacity increase, the Affected Community gains host community benefits to fund improvements to health and economic viability.

In the end, the inclusion of these 5 elements may take a facility that has been the burden of a community and convert it into a safe economic engine to drive the revitalization of that community. For existing facilities, this model provides the means to "clean-up" the facility and stop its perceived polluting affects. For new facilities, it creates the best possible opportunity for the operator to obtain permit approval with community support.

All together, the primary issues are health, social, cultural, and economic impacts; unless these issues can be addressed as stated in #1, then ALL BETS ARE OFF and the conflict is ON. Also note, steps 4 & 5 are optional and are to be pursued only if the Affected Community members agree to consider this option.